

No. 46426-8

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**John Tyler,**

Appellant.

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Clark County Superior Court Cause No. 02-1-00419-9

The Honorable Judge John P. Wulle

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. No rational jury could have found Mr. Tyler guilty of count II beyond a reasonable doubt.
2. The state presented insufficient evidence of sexual intercourse, which was necessary to convict Mr. Tyler of count II.

**ISSUE 1:** To convict for rape of a child, the state must prove that the accused engaged in sexual intercourse. Here, the state's evidence in support of count II provided only that "it" happened more than once during the relevant time period. Did the state present insufficient evidence for a rational jury to find beyond a reasonable doubt that Mr. Tyler engaged in sexual intercourse?

3. No rational jury could have found Mr. Tyler guilty of count IV beyond a reasonable doubt.
4. The state presented insufficient evidence that the alleged victim was under twelve years old during the alleged conduct charged in count IV.

**ISSUE 2:** To convict for rape of a child in the first degree, the state must prove that the alleged victim was under the age of twelve at the time of the misconduct. Here, J.A.R. testified that the incident had occurred "last year," which was after her twelfth birthday. Did the state present insufficient evidence for a rational jury to find beyond a reasonable doubt that J.A.R. was under twelve at the time of the incident charged in count IV?

5. No rational jury could have found Mr. Tyler guilty of count VI beyond a reasonable doubt.
6. No rational jury could have found Mr. Tyler guilty of count VIII beyond a reasonable doubt.
7. The state presented insufficient evidence that the alleged victim was under twelve years old during the alleged conduct charged in counts VI and VIII.

**ISSUE 3:** To convict for rape of a child in the first degree or child molestation in the first degree, the state must prove that the alleged victim was under the age of twelve at the time of the misconduct. Here, J.A.R. testified that she did not remember how old she was during the incidents comprising counts VI and VIII. Did the state present insufficient evidence for a rational jury to find beyond a reasonable doubt that J.A.R. was under twelve at the time of the events charged in counts VI and VIII?

8. The court violated Mr. Tyler's rights under Wash. Const. art. IV, § 16 by making judicial comments on the evidence.
9. The court commented on the evidence by instructing the jury that the alleged victims' dates of birth had been established as a matter of law.

**ISSUE 4:** When an alleged victim's age is an element of an offense, the court makes an impermissible comment on the evidence by including his/her birthdate in the jury instructions. Here, each of the court's to-convict instructions included the alleged victim's stated date of birth. Did the court make an impermissible comment on the evidence in violation of art. IV, § 16?

10. The court erred by admitting evidence of Mr. Tyler's use of corporal punishment, which was inadmissible under ER 404(b).
11. The court erred by admitting evidence of Mr. Tyler's use of corporal punishment, which was inadmissible under ER 403.
12. The evidence of Mr. Tyler's use of corporal punishment was not relevant to any proper purpose.
13. The evidence of Mr. Tyler's use of corporal punishment encouraged the jury to convict him based on propensity, in violation of his rights under the Fourteenth Amendment.

**ISSUE 5:** ER 403 and ER 404(b) prohibit introduction of evidence of uncharged misconduct, except in limited circumstances. Here, the court allowed the state to introduce evidence that Mr. Tyler used corporal punishment; the state did not present any evidence connecting his disciplinary tactics to the alleged sexual abuse. Did the trial court err by admitting evidence of uncharged misconduct?

14. Prosecutorial misconduct deprived Mr. Tyler of his Fourteenth Amendment due process right to a fair trial.
15. The prosecutor committed misconduct by “testifying” to “facts” that were not in evidence
16. The prosecutor committed misconduct by appealing to the passion and prejudice of the jury
17. The prosecutor committed misconduct by conveying a personal opinion of Mr. Tyler’s guilt.
18. The prosecutor’s misconduct prejudiced Mr. Tyler.
19. The prosecutor’s misconduct was flagrant and ill-intentioned.

**ISSUE 6:** Prosecutorial misconduct can deprive the accused of a fair trial. Here, the prosecutor committed misconduct by appealing to the jury’s passion and prejudice throughout her closing argument, expressing a personal opinion of guilt, and “testifying” to “facts” that had not been admitted into evidence. Did the prosecutor’s improper arguments deprive Mr. Tyler of his Fourteenth Amendment right to due process?

20. The language charging Mr. Tyler was deficient in violation of his rights under the Sixth and Fourteenth Amendments.
21. The language charging Mr. Tyler was deficient in violation of his rights under Wash. Const. art. I, §§ 3, 22.
22. The charging document failed to allege critical facts identifying the charges and allowing Mr. Tyler to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.
23. The charging document was insufficient to permit Mr. Tyler to prepare a meaningful defense.

**ISSUE 7:** A charging document must set forth any critical facts necessary to identify the particular crime charged. Here, the Information charging Mr. Tyler contained identical language for numerous charges, and provided no facts to differentiate the charges from one another or from any other alleged act during the multi-year charging periods. Did the omission of critical facts infringe Mr. Tyler’s right to an adequate charging document under the Fifth, Sixth, and Fourteenth Amendments and Wash. Const. art. I, §§ 3, 22?

24. The court erred by including Mr. Tyler's alleged prior convictions in his Judgment and Sentence when the state failed to present any evidence that those convictions had actually occurred.

**ISSUE 8:** The state must present some evidence that a prior conviction exists in order to use it to increase the offender score at sentencing. Here, the court found that Mr. Tyler had five prior felony convictions even though the state did not present any evidence to that effect. Did the court err by finding that Mr. Tyler had prior convictions absent any evidence?

25. The court erred by increasing Mr. Tyler's offender score based on five alleged prior convictions that should have "washed out."

**ISSUE 9:** Prior convictions for class B and C felonies do not add a point to an offender score if the person subsequently has spent 10 or 5 crime-free years in the community respectively. The court added five points to Mr. Tyler's offender score based on prior convictions for class B and C felonies even though the most recent one occurred fourteen years before Mr. Tyler's current convictions. Did the court err by increasing Mr. Tyler's offender score based on prior convictions that had "washed out"?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

John Tyler was a strict father. His daughter and three stepchildren had to earn privileges by completing their chores well and on time. RP 240. Mr. Tyler used corporal punishment when they misbehaved. RP 151-52, 172, 215-16, 243.

After more than eight years of this routine, three of the children – J.A.R., H.M.R., and E.M.K. -- claimed that Mr. Tyler had been sexually abusing them for years. Based on their reports, the state charged Mr. Tyler with twenty child sex offenses. CP 15-21.

The language of the Information charging Mr. Tyler simply listed the statutory elements of the offenses and added date ranges and the name and birthdate of the alleged victim. CP 15-21. This meant that the charging language for counts IV, VI, XI, and XIII was identical. CP 16-17. The same is true for counts I and II; V and VII; IX, XII, and XIV; and XVII and XVIII. CP 15-20. None of the counts in the Information contained any facts permitting the reader to distinguish what alleged incidents the state intended to rely upon. CP 15-21.

At trial, the state relied on Mr. Tyler's disciplinary practices as evidence of his guilt. RP 151-52, 172, 215-16, 243, 524, 539. Mr. Tyler objected, noting that the evidence was irrelevant, highly prejudicial, and

likely to inflame the jury. The court responded that the jury “is going to be impacted simply by the statement of what the charges are.” RP 19-20. The judge reasoned that “it doesn’t seem like [the evidence] is going to inflame them any worse than the case itself will.” RP 19. The court ruled that the evidence was admissible to explain the children’s delay in reporting the alleged abuse. RP 20.

The prosecutor elected to base counts I and II (for rape of a child in the first degree) on Mr. Tyler’s alleged conduct toward J.A.R. when they lived in an apartment, before moving into their current house. RP 495-98. Regarding count I, J.A.R. testified that Mr. Tyler engaged in intercourse with her and then gave her candy afterwards. RP 123-25. In support of count II, J.A.R. testified only that “it” happened more than once when they lived in the apartment. RP 125. She did not clarify what “it” meant. RP 125.

The state elected to rely on a different incident for count IV, which was also for rape of a child in the first degree against J.A.R. RP 501-04. In support of that count, J.A.R. testified that Mr. Tyler engaged in intercourse with her one night while her mother was working at the fair. RP 136-38. She testified, however, that it happened “last year.” RP 137. She also said that her twelfth birthday was two years before the trial. RP 116.

Counts VI and VIII were for first degree rape of a child and first degree child molestation, respectively. CP 17. Again, the prosecutor elected to rely on a specifically described incident for each of those charges. RP 509-12. J.A.R. testified, however, that she did not recall how old she was or what grade she was in during either one of those instances. RP 139-40, 146. Even so, the prosecutor argued that the jury could find that she was less than twelve years old at the time of the allegations because she also said that Mr. Tyler abused her over the course of many years. RP 514.

The prosecutor began her closing argument by telling the jury that they were fortunate because they had the opportunity to find Mr. Tyler guilty. RP 486. She said the jury was lucky because they could “hold him accountable for torturing these little girls.” RP 486.

She described Mr. Tyler as keeping a “harem.” RP 534. She recounted J.A.R.’s description of the pain she felt when Mr. Tyler allegedly anally raped her. RP 508-09. The prosecutor also emphasized that E.M.K. was Mr. Tyler’s “own flesh-and-blood, biological daughter.” RP 540. She said the jury had heard firsthand about “one of the most horrifying experiences any child could endure.” RP 486. She described Mr. Tyler as a “calculating human being.” RP 524.

Finally, the prosecutor argued that Mr. Tyler had threatened to beat the girls if they told anyone about the alleged abuse. RP 524. She also claimed that Mr. Tyler hit the girls with a belt if they refused to take their clothes off. RP 539.

Each of the court's to-convict instructions included the alleged victim's stated date of birth in the description of the first element. CP 36-38, 40-41, 45-59.

The jury found Mr. Tyler guilty of sixteen counts.<sup>1</sup> RP 567-70. Mr. Tyler's convictions were entered in 2002. RP 97.

At sentencing, the state did not present evidence that Mr. Tyler had any prior convictions. RP 586-608. The Judgment and Sentence, however, includes a finding that he had five prior felony convictions, the most recent of which was entered in 1988. CP 99.

Mr. Tyler notified the court and defense counsel that he wanted to appeal his convictions. RP 609-10. The trial judge made an oral order appointing an attorney for Mr. Tyler's appeal. RP 610. After discussion with defense counsel, the court agreed to contact the appellate attorney from chambers to ensure that the proper paperwork was filed for Mr. Tyler's appeal. RP 611. But no notice of appeal was ever filed on Mr. Tyler's behalf. CP 122.

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<sup>1</sup> Of the twenty charges, the jury rejected four of the alternative charges. RP 567-70.

Mr. Tyler was unaware that no notice of appeal had been filed until the court clerk informed him in 2011. CP 122-23. In June 2014, the Court of Appeals granted his *pro se* request to file a late notice of appeal and to be appointed counsel as public expense. CP 131-62, 163-65.

### **ARGUMENT**

**I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. TYLER OF COUNTS II, IV, VI, OR VIII.**

- A. No rational jury could have found beyond a reasonable doubt that Mr. Tyler engaged in sexual intercourse (as required for count II) based only on J.A.R.'s testimony that "it" happened more than once.

The state charged Mr. Tyler with two counts of first degree rape of a child based on alleged acts against J.A.R. while they lived in a previous apartment. RP 495-98. But J.A.R. testified only to one incident of sexual intercourse – that supporting count I. RP 123-25. Her testimony that "it" happened more than once was insufficient to prove beyond a reasonable doubt that Mr. Tyler had engaged in sexual intercourse a second time, as required to convict him of count II. RP 125; *State v. Jensen*, 125 Wn. App. 319, 327, 104 P.3d 717 (2005).

Conviction for first degree rape of a child requires proof of sexual intercourse. RCW 9A.44.073.

Generic testimony from an alleged victim of child sexual abuse can only support a specific charge if it describes:

(1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred.

*Jensen*, 125 Wn. App. at 327. In *Jensen*, the alleged victim testified to one instance of sexual contact. *Id.* at 326. The jury also heard testimony that Jensen had touched her private areas “a few times.” *Id.* at 327. That evidence was insufficient to support more than once conviction for child molestation because it did not describe the alleged acts with sufficient particularity. *Id.* at 328.

Likewise, J.A.R.’s testimony that “it” happened more than once is insufficient to convict Mr. Tyler of an additional count of child molestation. *Id.* The evidence does not clarify what “it” means. The evidence was not particular enough for the jury to determine what misconduct, if any, occurred on those additional occasions. *Id.* It was certainly not specific enough to prove sexual intercourse.

Evidence is insufficient if, when taken in the light most favorable to the state, no rational jury could have found each element of the offense proved beyond a reasonable doubt. *Id.* at 325. Here, no rational jury could have found that the state had proved that Mr. Tyler engaged in sexual intercourse with J.A.R. on more than one occasion during the

charging period for counts I and II. Mr. Tyler's conviction for count II must be reversed. *Id.*

- B. No rational jury could have found beyond a reasonable doubt that J.A.R. was younger than twelve during the commission of count IV, when she testified that it happened "last year," which was after her twelfth birthday.

Conviction for child molestation in the first degree requires proof that the alleged victim was under the age of twelve. RCW 9A.44.073.

J.A.R. turned twelve two years before Mr. Tyler's trial. RP 116. For count IV, the state relied on evidence regarding an incident that happened one night in the room Mr. Tyler shared with J.A.R.'s mother, while her mother was working at the fair. RP 501-04. J.A.R. testified that the incident had happened "last year." RP 137.

No rational jury could have found beyond a reasonable doubt that J.A.R. was younger than twelve at the time of the incident charged in count IV. *Jensen*, 125 Wn. App. at 325. Indeed, the state's evidence indicated that she was either twelve or thirteen at the time. RP 116, 137. Mr. Tyler's conviction for count IV must be reversed. *Id.*

C. No rational jury could have found beyond a reasonable doubt that J.A.R. was under twelve during the commission of counts VI and VIII, when she testified that she did not remember how old she was and there was no other evidence regarding her age at the time of those alleged incidents.

Count VI (for rape of a child in the first degree) and count VIII (for child molestation in the first degree) both required proof that J.A.R. was under twelve years old at the time of the incident. RCW 9A.44.073; RCW 9A.44.083. J.A.R.'s twelfth birthday was seventeen months before Mr. Tyler moved out of the family home. RP 116.

For count VI, the state relied on J.A.R.'s testimony about an alleged incident of anal sex in her bedroom during the day. RP 509. But J.A.R. testified that she did not remember how old she was during that alleged incident or what grade she was in at the time. RP 139-40.

Similarly, for count VIII, the state relied on J.A.R.'s testimony that Mr. Tyler put her hand on his penis in her mother's room. RP 510-12. Again, J.A.R. stated that she did not remember how old she was during that alleged incident. RP 146.

The state did not present any evidence that J.A.R. was younger than twelve at the time of the allegations in counts VI and VIII. *See* RP *generally*. No rational jury could have found beyond a reasonable doubt that the incidents happened before her twelfth birthday. *Jensen*, 125 Wn.

App. at 325. Mr. Tyler's convictions for counts VI and VIII must be reversed. *Id.*

**II. THE TRIAL COURT MADE IMPERMISSIBLE COMMENTS ON THE EVIDENCE BY INCLUDING THE ALLEGED VICTIMS' ALLEGED BIRTHDATES IN THE TO-CONVICT INSTRUCTIONS.**

When an alleged victim's age is an element of a crime, the court makes an unconstitutional comment on the evidence by including his/her alleged date of birth in the jury instructions. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007); Wash. Const. art. I, § 16.

The age of the alleged victim was a critical element of each of the offenses with which Mr. Tyler was charged. RCW 9A.44.073, RCW 9A.44.076, RCW 9A.44.083, RCW 9A.44.086. Even so, each of the court's to-convict instructions in Mr. Tyler's case included the birthdate of the alleged victim. CP 36-38, 40-41, 45-59. Accordingly, the court's instructions permitted the jury to infer that the girls' dates of birth had already been proved, removing the age elements of the offenses from the jury's consideration. *Id.*

An improper judicial comment on the evidence is presumed prejudicial. *Id.* at 743. Reversal is required unless the record affirmatively shows that no prejudice could have resulted. *Id.* In *Jackman*, reversal was required even though the accused did not dispute

alleged victims' birthdates at trial. *Id.* at 745. Because the jury instructions removed the facts regarding an element of the crime from the jury's consideration altogether, the court was unable to find beyond a reasonable doubt that no prejudice could have resulted. *Id.*

Similarly, in Mr. Tyler's case, the record does not affirmatively demonstrate that the court's improper comments on the evidence could not have changed the outcome. *Id.* The girls' ages were at issue in each charge. As outlined above, there was already confusion and ambiguity regarding whether J.A.R. was under or over twelve years old during the allegations making up several charges. Similarly, H.M.R. was alleged to have turned twelve less than a week after Mr. Tyler's arrest. RP 184. Any reasonable doubt about the girls' birthdates would have made a difference in Mr. Tyler's case. But the court's instructions completely removed that issue from the jury's consideration. The court's improper comments on the evidence require reversal of Mr. Tyler's convictions. *Id.*

The court violated Mr. Tyler's art. I, § 16 rights by making impermissible comments on the evidence. *Id.* Mr. Tyler's convictions must be reversed. *Id.*

**III. THE COURT ERRED BY ADMITTING EVIDENCE OF MR. TYLER’S USE OF CORPORAL PUNISHMENT, WHICH WAS NOT RELEVANT TO THE CHARGES AND WAS NOT ADMISSIBLE FOR ANY PROPER PURPOSE, AND WAS MORE PREJUDICIAL THAN PROBATIVE.**

The state presented evidence that Mr. Tyler used corporal punishment to discipline his children when they did not complete their chores. RP 151-52, 172, 215-16, 243. When Mr. Tyler objected to the evidence, the court stated only that “it doesn’t seem like [the evidence] is going to inflame them any worse than the case itself will.” RP 19. Without any further analysis, the court ruled that the evidence was admissible to explain the children’s delay in reporting the alleged abuse. RP 20. The court erred by overruling Mr. Tyler’s objection in violation of ER 404(b) and ER 403.

The state did not present any evidence linking the corporal punishment to the alleged sexual abuse or to the children’s delayed disclosure. *See RP generally*. In closing, however, the state relied on the evidence to argue that Mr. Tyler threatened the alleged victims in order to gain compliance with his sexual demands and to prevent them from telling anyone what was happening. RP 524, 539.

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d

708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Under ER 404(b),

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>2</sup>

ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.<sup>3</sup> *State v. Gunderson*, --- Wn.2d ---, 337 P.3d 1090, 1093-94 (November 20, 2014).

Here, the evidence of Mr. Tyler's use of corporal punishment was not relevant to any element of any of his charges. It was also not relevant to motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. The court ruled that the evidence was admissible to

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<sup>2</sup> The use of propensity evidence to prove a crime may also violate due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).<sup>2</sup> A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

<sup>3</sup> ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

explain the children's delay in disclosing the alleged sexual abuse. RP 20. But the state did not present any evidence linking the corporal punishment to the delayed reporting. *See RP generally*. The only possible purpose of the evidence was to make Mr. Tyler appear more violent. The evidence was inadmissible under ER 404(b).

The risk of unfair prejudice stemming from evidence regarding Mr. Tyler's use of corporal punishment also outweighed any probative value under ER 403. The evidence was not relevant to any of the charges against Mr. Tyler. But it carried a high risk that the jury would consider it as propensity evidence regarding Mr. Tyler's violent nature.

Before admitting misconduct evidence under ER 404(b), the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted,

the court must give a limiting instruction to the jury. *Gunderson*, --- Wn.2d ---, 337 P.3d 1090, 1093.

The court did not conduct this inquiry (or any meaningful inquiry) on the record in Mr. Tyler's case. RP 18-20. Instead, the court ruled, essentially, that any evidence would be admissible in Mr. Tyler's case because the charges were already likely to inflame the jury. RP 19-20. The court also failed to give a limiting instruction, prohibiting the jury from considering the testimony as propensity evidence. CP 22-66.

The potential for prejudice from admission of other bad acts evidence is "at its highest in sex offense cases." *Slocum*, 183 Wn. App. at 442 (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)). Such evidence is inadmissible 'not because it has no appreciable probative value but because it has too much.' *Id.* The evidence presents a danger that the jury will convict not because of the strength of the evidence of the charges but because of the jury's overreliance on evidence of other acts. *Id.*

Rather than consider the high risk of unfair prejudice in Mr. Tyler's sex case, the court ruled that the inflammatory nature of the charges vitiated the court's duty to apply the rules of evidence. RP 19-20. The court basically stated that anything goes in sex cases. RP 19-20. The

court failed to meaningfully apply ER 403 and 404(b) or protect Mr. Tyler from the unfair use of propensity evidence.

The improper admission of evidence under ER 404(b) requires reversal if there is a reasonable probability that it affected the outcome of the trial. *Slocum*, 183 Wn. App. at 456. Here, the prosecutor relied on the evidence to argue in closing that Mr. Tyler was “calculating. RP 524. She said that Mr. Tyler “would beat [the children] to a point that next time he wanted something from them, they would do it or else they would get hurt.” RP 539. She argued that Mr. Tyler hit the children in order to prevent them from disclosing the alleged abuse. RP 524.

Mr. Tyler was prejudiced by the court’s improper admission of the evidence. *Id.*

The court erred by admitting evidence of Mr. Tyler’s use of corporal punishment, which was inadmissible under ER 404(b) and whose probative value was far outweighed by the risk of unfair prejudice. *Slocum*, 183 Wn. App. at 457. Mr. Tyler’s convictions must be reversed. *Id.*

**IV. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE, APPEALING TO THE JURY’S PASSION AND PREJUDICE, AND EXPRESSING HER PERSONAL OPINION.**

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor’s misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor’s improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction

could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn.

App. 533, 552, 280 P.3d 1158 (2012).

- A. The prosecutor committed misconduct by arguing that Mr. Tyler beat the girls in order to get them to comply with his sexual advances and to prevent them from disclosing the alleged abuse when the evidence showed only that he used corporal punishment when they did not complete their chores.

The four children all testified that Mr. Tyler used corporal punishment as discipline. RP 151-52, 172, 215-16, 243. The two oldest children clarified that the spankings generally happened when they did not finish their chores. RP 151-52, 215-16. None of the children said that he hit them in order to prevent disclosure of the alleged abuse. RP 151-52, 172, 215-16, 243. Likewise, none of them said that he hit them to get them to comply with his sexual advances. RP 151-52, 172, 215-16, 243. Rather, J.A.R. said that she would be grounded, not hit, if she told anyone about the alleged abuse. RP 152. No expert testified that children, in general, are more likely to delay reporting of sexual abuse if subjected to corporal punishment. *See RP generally.*

Still, the prosecutor argued in closing that Mr. Tyler hit the children in order to prevent them from telling anyone about the allegations. RP 524. She said this was evidence that he was “calculating.” RP 524. She also argued that Mr. Tyler “would beat them to a point that

next time he wanted something from them, they would do it or else they would get hurt.” RP 539.

A prosecutor commits misconduct by urging a jury to consider “facts” that have not been admitted into evidence. *Pierce*, 169 Wn. App. at 553. Here, the prosecutor “testified” to “facts” linking Mr. Tyler’s use of corporal punishment to the alleged sexual abuse where no such connection existed in the evidence. RP 524, 539. The prosecutor’s argument was improper. *Id.*

Mr. Tyler was prejudiced by the prosecutor’s misconduct. The alleged victims’ extremely delayed reporting was enough to raise a reasonable doubt about the allegations in the mind of the jury. But the prosecutor’s improper arguments that the delay was justified was based on “facts” that were not in evidence, “facts” which made Mr. Tyler appear even more reprehensible in to the jury. There is a substantial likelihood that the prosecutor’s improper arguments affected the outcome of Mr. Tyler’s trial. *Glasmann*, 175 Wn.2d at 704.

Arguments with an “inflammatory effect on the jury” are generally not curable by an instruction. *Pierce*, 169 Wn. App. at 552. Here, the prosecutor’s arguments used “facts” not in evidence to argue that Mr. Tyler was “calculating.” The argument appealed to the jurors’ emotions and was directly relevant to a reason to doubt the alleged victims’

testimony. The prosecutor's misconduct was flagrant and ill-intentioned.

*Id.*

Prosecutorial misconduct deprived Mr. Tyler of a fair trial.

*Glasmann*, 175 Wn.2d at 703-04. The prosecutor's improper argument of "facts" not in evidence requires reversal of Mr. Tyler's convictions.

*Pierce*, 169 Wn. App. at 553

- B. The prosecutor improperly appealed to the jury's passion and prejudice and conveyed a personal opinion by arguing that the jury was "fortunate" because they got to convict Mr. Tyler and by emphasizing evidence that was legally irrelevant but was likely to inflame the jurors.

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.* It is also improper for a prosecutor to convey his/her personal opinion of the accused's guilt. *Id.* at 706-07.

Here, the prosecutor argued that the jury was "fortunate" because: "you can find the Defendant guilty. You can hold him accountable for torturing these little girls." RP 486.

During the remainder of her argument, the prosecutor emphasized evidence that was legally irrelevant but likely to inflame the jurors' emotions. For example, the state harped on J.A.R.'s testimony regarding the pain she felt during an alleged anal rape. RP 508-09. Even though the

evidence was not relevant to any element of any charge, the prosecutor said “that’s got to say something to you as a jury, sitting there, listening to a thirteen-year-old girl explain the pain that she went through.” RP 508-09.

The prosecutor also described Mr. Tyler as keeping a “harem.” RP 534. She emphasized that one of the alleged victims was Mr. Tyler’s biological daughter, “his own flesh-and-blood.” RP 540. She “thank[ed] God” that there weren’t any more alleged victims “that we know of.” RP 540. She said the jury had heard firsthand about “one of the most horrifying experiences any child could endure.” RP 486. She described Mr. Tyler as a “calculating human being.” RP 524.

The prosecutor’s argument was improper. *Glassman*, 175 Wn.2d at 704, 706-07. It appealed to the jury’s passion and prejudice rather than to the evidence in the case. It also conveyed the prosecutor’s personal opinion of Mr. Tyler’s guilt.

Mr. Tyler was prejudiced by the prosecutor’s misconduct. *Glasmann*, 175 Wn.2d at 704. The prosecutor opened her argument with her opinion that the jury was fortunate because they could convict Mr. Tyler. RP 486. Those statements colored the entire argument and encouraged the jury to rely on fervor and personal opinion rather than the evidence in the case. The prosecutor continued her argument by appealing

to the jury's emotions. RP 486, 524, 534, 540. There is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Mr. Tyler's trial. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to standards and prior decisions prohibiting her from appealing to passion and prejudice or expressing a personal opinion of guilt. *See e.g. State v. Armstrong*, 37 Wash. 51, 79 P. 490 (1905); *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993); *American Bar Association Standards for Criminal Justice* std 3-5.8 (1993). The arguments were also inflammatory, and, accordingly, not curable by an instruction. *Pierce*, 169 Wn. App. at 552.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by appealing to the jury's passion and prejudice and arguing based on her personal opinion of Mr. Tyler's guilt. *Glasmann*, 175 Wn.2d at 704, 706-07. Mr. Tyler's convictions must be reversed. *Id.*

- C. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Tyler's convictions.

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions

can erase their combined prejudicial effect.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Here, the prosecutor argued facts not in evidence, conveyed her personal opinion of Mr. Tyler’s guilt, and appealed repeatedly to the jury’s passion and prejudice.

Whether considered individually or in the aggregate, the prosecutor’s improper arguments require reversal of Mr. Tyler’s convictions. *Walker*, 164 Wn. App. at 737.

**V. THE INFORMATION CHARGING MR. TYLER WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE ANY CRITICAL FACTS TO DIFFERENTIATE THE NUMEROUS CHARGES FROM ONE ANOTHER IN ORDER TO PREPARE A MEANINGFUL DEFENSE OR PROTECT AGAINST FUTURE VIOLATIONS OF DOUBLE JEOPARDY.**

The document charging Mr. Tyler did not contain any of the facts necessary for him to differentiate among the twenty charges. CP 15-21. Indeed, the language of many of the allegations was identical to that of one or more other allegations. CP 15-21. It became clear during trial that Mr. Tyler’s defense attorney was unable to deduce which of the state’s charges corresponded to each alleged act. RP 402-03. The document charging Mr. Tyler was constitutionally deficient because it did not include enough information to permit him to prepare a defense or to protect against subsequent prosecution for the same acts.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.<sup>4</sup> A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).<sup>5</sup> The charge must include more than “the elements of the offense intended to be charged.”

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<sup>4</sup> Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

<sup>5</sup> The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amend. V, XIV.

*Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted). Here, the language charging Mr. Tyler meets only the first element of this test.

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

Here, the Information charging Mr. Tyler did not include the facts necessary to “inform [him] of the specific offense.” *Russell*, 369 U.S. at 763-64. Indeed, the charging language for counts IV, VI, XI, and XIII was identical. CP 16-17. The language for counts I and II; V and VII; XII and XIV; and XVII and XVIII was also identical. CP 15-20. Even when liberally construed, there is no information within the four corners of the charging document permitting Mr. Tyler to differentiate the allegations in those sets of charges from one another. CP 15-21.

It became clear during trial that defense counsel was not able to distinguish which alleged acts corresponded to each charge. RP 402-03. The state responded only that the confusion would be cleared up during closing argument. RP 401. By closing argument, however, it was too late for Mr. Tyler to present a defense or to explain why the evidence was insufficient for any single charge.

The language charging Mr. Tyler was not adequate to permit him to prepare a defense or to protect against subsequent prosecution for the same acts. *Valentine*, 395 F.3d at 631. Mr. Tyler's convictions must be reversed. *Id.*

**VI. THERE WAS NO EVIDENCE SUPPORTING THE ALLEGED PRIOR CONVICTIONS LISTED ON MR. TYLER'S JUDGMENT AND SENTENCE, WHICH SHOULD HAVE WASHED OUT ANYWAY.**

A. The state did not present evidence that Mr. Tyler had any prior convictions.

In order for a prior conviction to be included in an offender score calculation, the state must prove that the conviction occurred by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). Bare assertions on the part of the state fail to meet this burden. *Id.* The state must introduce "evidence of some kind to support the alleged criminal history." *Id.*

Here, Mr. Tyler's Judgment and Sentence lists five prior convictions. CP 99. But the state did not present any evidence at sentencing that Mr. Tyler had ever been convicted of a crime. RP 586-608. No evidence supports the court's finding that Mr. Tyler had five prior felony convictions.

Mr. Tyler's case must be remanded for correction of his Judgment and Sentence. *Hunley*, 175 Wn.2d at 909. The alleged prior convictions must be deleted.

### **CONCLUSION**

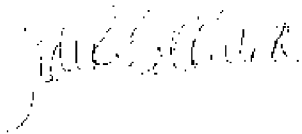
The state presented insufficient evidence for a reasonable jury to find Mr. Tyler guilty of counts II, IV, VI, or VIII beyond a reasonable doubt. The court made unconstitutional comments on the evidence by including the children's alleged birthdates in the jury instructions. The court erred by admitting highly prejudicial, irrelevant evidence of Mr. Tyler's use of corporal punishment in violation of ER 404(b) and ER 403. The prosecutor committed flagrant and ill-intentioned misconduct by arguing "facts" not in evidence, conveying her personal opinion of Mr. Tyler's guilt, and appealing to the jury's passion and prejudice throughout closing argument. The language charging Mr. Tyler was constitutionally deficient because it did not permit him to prepare a meaningful defense or

to protect against subsequent prosecution for the same acts. Mr. Tyler's convictions must be reversed.

The court erred by including five prior convictions in Mr. Tyler's offender score when the state did not present any evidence that they had actually occurred. Mr. Tyler's case must be remanded for correction of his Judgment and Sentence.

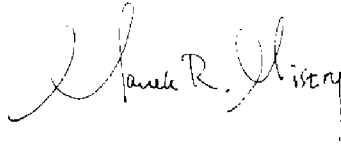
Respectfully submitted on February 17, 2015,

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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

John Tyler, DOC #901014  
Airway Heights Correction Center  
PO Box 1899  
Airway Heights, WA 99001

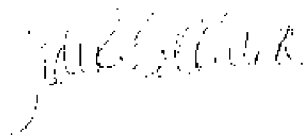
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 17, 2015.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

## BACKLUND & MISTRY

**February 17, 2015 - 3:11 PM**

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**February 18, 2015 - 10:53 AM**

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